Nos. 02-722, 02-733

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IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, *et al.*,
Petitioners,

v.

HARRY LOW, COMMISSIONER OF INSURANCE
FOR THE STATE OF CALIFORNIA,
Respondent.

GERLING GLOBAL REINSURANCE CORP. *et al.*,
Petitioners,

v.

HARRY LOW, COMMISSIONER OF INSURANCE
FOR THE STATE OF CALIFORNIA,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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The Federal Republic of Germany respectfully submits this brief as amicus curiae in support of the petitions for writs of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739 (2001), and *Gerling Global Reinsurance Corp. of America v. Low*, 296 F.3d 832 (2002).[1]

INTEREST OF AMICUS CURIAE

The Federal Republic of Germany has a very strong interest in this case, as reflected by its prior participation as an amicus curiae, because the California regulatory statute at issue, the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"),[2] has a manifestly adverse impact on the Federal Republic's sovereign interests and on its foreign relations with the United States of America. In addition, the HVIRA, if enforced, would require German companies who themselves do no business in California to violate German privacy laws. The Federal Republic submits this amicus curiae brief to make clear the extent to which actions of the State of California infringe on the sovereignty of the Federal Republic in these matters and impair the ability of the Federal Republic to engage in diplomatic relations with the United States.

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[1] Petitioners and respondent have consented to the filing of this brief; their letters of consent are on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Federal Republic of Germany, made a monetary contribution to the preparation or submission of this brief.

[2] Cal. Ins. Code §§ 13800-13807 (SER 516-524). "ER" refers to the Excerpts of Record in the preliminary injunction appeal, and "SER" refers to the Supplemental Excerpts of Record in the permanent injunction appeal.

SUMMARY OF ARGUMENT

The Ninth Circuit's decisions upholding the actions of the State of California affront the sovereignty of the Federal Republic. Its sovereign interests are neither marginal nor academic—the question of restitution and compensation for victims of the National Socialist era and World War II is of the utmost importance for Germany, both as a matter of domestic and foreign policy. Germany has worked constructively with the United States and other members of the international community for over 55 years to structure and provide over $100 billion in compensation to victims.

The HVIRA directly interferes with implementation of the most recent international agreements—the July 17, 2000 "Berlin Agreements"[3]—pursuant to which the Federal Republic and German companies agreed to create a Foundation to provide DM 10 billion (approximately $5 billion) in additional compensation to victims, including those whose insurance policies from the National Socialist era may have been unpaid. By international accord, the Foundation is to be the exclusive remedy and forum for all asserted claims, including insurance-related claims.[4]

Not content with U.S. foreign policy and international agreements on Holocaust-era insurance claims that promote conciliation and legal peace, the State of California has pursued its own more aggressive "foreign policy," attempting to regulate how insurance companies in Germany (and

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[3] Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the Foundation, "Remembrance, Responsibility and the Future," July 17, 2000 ("Executive Agreement") (ER 818-37, SER 1447-53); Joint Statement on Occasion of the Final Plenary Meeting Concluding International Talks on the Preparation of the Foundation, "Remembrance, Responsibility and the Future," July 17, 2000 ("Joint Statement") (ER 812-16).

[4] *See* Executive Agreement, art. 1(1), 1(4) (ER 821-22).

elsewhere in Europe) should address the consequences of the National Socialist era and World War II and attempting to set up California courts as a forum for contentious litigation regarding such claims. Seeking to leverage its regulatory authority over California insurance companies to regulate the conduct of insurance companies overseas, the State of California enacted a statute that threatens to revoke the license of any California insurance company whose German (or other European) affiliates fail to place in a public registry established by the State of California extensive information, including personal data, regarding every insurance policy issued in Europe to Europeans between 1920 and 1945.

The Ninth Circuit decisions upholding the HVIRA directly conflict with decisions of other Circuits and violate well-established legal principles: (a) by holding, in the first decision, that the HVIRA did not violate limits imposed on state power by the reservation to the federal government of the Foreign Affairs power and by the dormant Foreign Commerce Clause of the U.S. Constitution; and (b) by holding, in the second decision, that the HVIRA did not exceed limits imposed on state power by the Due Process Clause of the U.S. Constitution to legislate with respect to matters outside its boundaries. Certiorari is necessary and appropriate because the Ninth Circuit's decisions, if left unreviewed and uncorrected, would endorse the State of California's intrusion on German sovereignty and impede the Federal Republic's ability to engage in diplomatic relations with the United States as a unitary political entity.

ARGUMENT

1. German Sovereign Interests Regarding the Regulation of German Insurance Companies and Data Protection

The Federal Republic has sovereign authority to regulate insurance companies in Germany. The Federal Republic has enacted an extensive statutory framework, including the

Insurance Supervision Law (Versicherungsaufsichtsgesetz or VAG). The VAG designates the Federal Financial Services Supervisory Office (Bundesanstalt für Finanzdienstleistungsaufsicht (BAFIN), formerly known as Bundesaufsichtsamt für das Versicherungswesen (BAV)) as the competent supervisory body of the federal government for the regulation of insurance in Germany and grants the BAFIN significant powers to regulate the German insurance market. §§ 81-103 VAG.

German insurance companies are also subject to other provisions of German law, including German privacy laws such as the Federal Data Protection Law (Bundesdatenschutzgesetz or BDSG). Germany, like most European countries, has "data protection" laws that are typically far more stringent than in the United States and reflect a strong social policy against dissemination of private information that may be in governmental or corporate records. The BDSG prohibits the disclosure of personal data, including the disclosure of certain information regarding insurance policy records by German insurance companies without the express authorization of policyholders or their beneficiaries. § 28(2) Nr. 1b BDSG.

As the Federal Republic advised the Ninth Circuit,[5] the relevant German regulatory agencies have concluded that compliance by German companies with the HVIRA would cause them to violate German law and thereby become subject to civil and criminal penalties.[6] As the Federal Republic informed the Ninth Circuit, these are correct

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[5] Brief Amicus Curiae Supporting Affirmance of Summary Judgment for Plaintiffs-Appellees/Cross-Appellants (filed March 18, 2002) ("March 18, 2002 FRG Brief") at 15-17.

[6] The District Government of Cologne, Germany, concluded on May 16, 2000, that under the BDSG "the transmission of data in the form of lists pertaining to all policyholders from 1920-1945 . . . *is not permissible*." (ER 1182) (emphasis added).

conclusions under German law.[7] The HVIRA purports to require public disclosure in California of all policies issued in Europe between 1920 and 1945, necessarily revealing personal and confidential information regarding a million or more policies held by persons who were not victims of National Socialist persecution.

2. German Sovereign Interests Regarding Post-War Restitution and Compensation Programs

The question of restitution and compensation for Holocaust victims, including payments on unpaid insurance policies, has been an overarching concern of the Federal Republic since the end of the World War II. As the first German Chancellor, Konrad Adenauer, acknowledged fifty years ago: "[U]nspeakable crimes have been committed, and they demand restitution, both moral and material."[8] Accordingly, since its founding in 1949, the Federal Republic has sought to address the heinous wrongs committed during the National Socialist era and World War II, with full awareness that no amount of money will ever be enough to atone for those crimes.

In accordance with established principles of international law and custom, Germany and the international community have dealt with the question of restitution and compensation exclusively on a governmental and intergovernmental basis pursuant to international agreements among Germany, the United States, and other sovereign nations and pursuant to German domestic legislation. The Federal Republic entered into a series of international agreements after the war regarding restitution and compensation for victims of the National Socialist era and World War II with all Western European nations, the United States, and Israel. After the fall

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[7] March 18, 2002 FRG Brief at 17.

[8] Germany Online, "German Compensation for National Socialist Crimes," *at* http://www.germany-info.org/newcontent/np.bak/np_3g.html (last visited Dec. 12, 2002).

of the Iron Curtain, Germany reached comparable agreements with Eastern European nations.

Pursuant to its international obligations, the Federal Republic enacted legislation establishing extensive restitution and compensation programs over the past 55 years to remedy the wrongs committed during the National Socialist era and World War II. As part of these programs, Germany returned all real estate and other assets capable of being restored to their rightful owners, including 700,000 objects of art and 2.5 million books; paid over two million claims for assets that could not be returned including virtually all insurance policies; and reached global settlements with Jewish survivor organizations with respect to those victims who died without heirs or did not file compensation claims. To date, the Federal Republic has paid roughly $100 billion in compensation and continues to pay about $600 million annually to about 100,000 pensioners.[9] The United Nations has applauded the Federal Republic's restitution and compensation programs as "[t]he most comprehensive and systematic precedent of reparation by a Government to groups of victims for the redress of wrongs suffered . . . ."[10]

3. German-U.S. Agreement on a German Foundation

Germany's consistent practice of addressing the consequences of the National Socialist era on a governmental and intergovernmental basis culminated in the year 2000 in an international agreement between the Federal Republic and the United States on the creation of a German Foundation to provide a further measure of relief to aging victims, including those who suffered at the hands of German companies. *See*

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[9] *See id.*

[10] *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., Provisional Agenda Item 4, at 55, ¶ 107, U.N. Doc. E/CN.4/Sub. 2/1993/8.

Executive Agreement (ER 818-37, SER 1447-53). This Agreement resulted from nearly two years of negotiations under the leadership of Chancellor Schröder and President Clinton. The twin objectives of the Executive Agreement are "to complement the creation of the Foundation and to foster all-embracing and enduring legal peace for German companies with respect to the National Socialist era and World War II." *Id.*, art. 3(1) (ER 824).

The German Parliament (Bundestag) established the Foundation pursuant to the Foundation Law as an instrumentality of the Federal Republic.[11] It is endowed with assets of $5 billion, half contributed by the Federal Republic and half on a voluntary basis by thousands of German companies. The Foundation will provide payments to over a million aging victims of National Socialist oppression and persecution, specifically including payments on any insurance policies that remain unpaid notwithstanding the earlier extensive post-war restitution and compensation programs. The Executive Agreement declares that it is in the foreign policy interests of the Federal Republic and the United States for the Foundation to be the exclusive remedy and forum for addressing all claims, including insurance claims, asserted against German companies arising from the National Socialist era and World War II. *See* Executive Agreement, arts. 1(1), 1(4) (ER 820-22).

Article 1(4) of the Executive Agreement provides that any remaining unpaid insurance policies that come within the claims-handling procedures adopted by the International Commission on Holocaust-Era Insurance Claims (ICHEIC) as of July 2000 will be processed by German companies "on the basis of such procedures and on the basis of additional claims handling procedures that may be agreed among the

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[11] *See* German Federal Law on the Creation of a Foundation "Remembrance, Responsibility and the Future," *available at* http://www.stiftung-evz.de/fremdsp/englisch/st_ges_en.html (enacted Aug. 12, 2000) ("Foundation Law").

Foundation, ICHEIC, and the German Insurance Association." *Id.*, art. 1(4) (ER 822). On October 16, 2002, the Foundation, ICHEIC, and the German Insurance Association signed an agreement regarding such claims handling procedures and the publication of pertinent insurance records, in a manner that satisfies the requirements of European data protection laws. (Lodg. L70-L89). On October 17, 2002, U.S. State Department spokesman Richard Boucher explained that "[t]he United States continues to support the work of the Foundation, including through fulfillment of its obligations under the July 2000 U.S.-German Executive Agreement. This insurance agreement is the result of ongoing international efforts to address the injustices of World War II and the National Socialist era. The United States continues to support efforts to resolve matters of Holocaust restitution and compensation through cooperative means outside of litigation." U.S. Department of State, Press Statement, *at* http://www.state.gov/r/pa/prs/ps/2002/14455.htm (Oct. 17, 2002).

The Berlin Agreements recognize that "for the last 55 years the parties have sought to work to address the consequences of the National Socialist era and World War II through political and governmental acts" and that "this Agreement and the establishment of the Foundation represent a fulfillment of these efforts." Executive Agreement, preamble (ER 821). The Executive Agreement further states that the Federal Republic and the United States agree that "both parties desire all-embracing and enduring legal peace to advance their foreign policy interests." *Id.* (ER 820). Consistent with German and U.S. foreign policy, the Foundation Law excludes further claims, *see* Foundation Law § 16(1), and the Executive Agreement obligates the United States to take steps both in court and with state and local governments to foster all-embracing and enduring legal peace for German companies. *Id.*, arts. 2(1) and 2(2) (ER 822-23; 832-35).

This bilateral German-U.S. agreement was accompanied by a Joint Statement signed by the Federal Republic, the United States, Israel, five Central and Eastern European nations, the Conference on Jewish Material Claims against Germany, and other interested parties reflecting an international consensus that it is in all parties' interests for the Foundation to be the exclusive remedy and forum for the resolution of all National Socialist era and World War II claims against German companies and that German companies should receive all-embracing and enduring legal peace. *See* Joint Statement, preamble, arts. 4(b) & (c) (ER 812-16).

4. California's Regulation of Conduct with No Connection to California

Dissatisfied with the efforts of sovereign nations and other parties reflected in this international consensus, the State of California enacted the HVIRA and related legislation in 1999 as part of its own incompatible policy of promoting litigation in California courts as a means to redress National Socialist era and World War II wrongs. The HVIRA threatens to revoke the license of any insurance company doing business in California unless it provides for publication in California extensive personal information regarding each insurance policy issued by any German (or other European) "related" affiliate that sold insurance policies in Europe between 1920 and 1945, even if the affiliate never had any connection to the State of California and even if its relationship to a California licensee began long after the war. HVIRA §§ 13804, 13806 (SER 520-21, 523). The HVIRA thus mandates disclosure of a million or more policies held by persons who were not victims of National Socialist persecution. The detailed information required by the HVIRA includes, for each of these policies: the names of the policyholders and beneficiaries; the "current status" of the policy; and the "city of origin, domicile, or address" for each policyholder. HVIRA § 13804(a) (SER 520). Related

California legislation purports to create a California cause of action to recover on Holocaust-era insurance claims and further purports to waive applicable statutes of limitation in conflict with German statutory law.

The HVIRA's extraterritorial reach is vast. It seeks to regulate insurance companies and policies that have no nexus with the State of California: the insurance companies that issued policies between 1920 and 1945 were in Germany (or elsewhere in Europe), and they issued policies in Germany (or elsewhere in Europe). Nothing in the HVIRA requires that the policyholders or beneficiaries have any connection with the State of California. California's attempt to regulate entities and transactions that have no connection to the state violates international law regarding the limits of legislative jurisdiction and the Due Process Clause of the U.S. Constitution.

5. California's Conflicting "Foreign Policy"

The HVIRA directly contravenes German legislation. By threatening to suspend the license of California insurance companies unless "related" insurance companies in Germany agree to the publication in California of detailed information concerning German and other European policies, the HVIRA seeks to supplant the Federal Republic's regulation of insurance companies in Germany with the supposedly more reasoned judgment of the State of California, directly implying that the Federal Republic cannot be trusted to perform its sovereign duties. Furthermore, the HVIRA requires California affiliates to disclose information held by related German insurance companies notwithstanding applicable German privacy laws governing disclosure of the required information. *See* § 28(2) Nr. 1b BDSG. Unauthorized disclosure may result in civil and criminal penalties for German insurance companies, and the State of California's requirement that this information be published raises issues with no obvious solution.

The HVIRA has a direct, significant effect on Germany: if German insurance companies fail to comply with the publication requirements, the California insurance companies to which they are now affiliated (some 55 to 80 years after the issuance of the policies) will lose their licenses to do business in the State of California. The State of California has thus improperly leveraged its regulatory authority over insurance companies doing business in California to regulate the conduct of "related" insurance companies in Europe that have never done business in the state and are under the regulatory jurisdiction of Germany.

The HVIRA is also directly at odds with the German-U.S. Agreement and seeks to second-guess over 55 years of intergovernmental and governmental measures undertaken by the Federal Republic, the United States, and other sovereign nations to address the consequences of the National Socialist era and World War II. The HVIRA seeks to implement California's own "foreign policy" by replacing the international consensus on nonconfrontational resolution through the German Foundation with a scheme premised on coerced publication and litigation in California courts.

The puzzling assertions in the panel's first decision that (a) "there is no evidence that HVIRA would be applied in a way that would implicate the diplomatic concerns mentioned in *Zschernig*,"[12] and (b) "HVIRA and the executive branch initiatives [including the Executive Agreement] share the same policy objective, although they seek to achieve that policy objective by varying techniques"[13] are remarkably erroneous. It simply cannot be that a policy of the United States Government expressly recognizing that it is in the United States' foreign policy interests for the German

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[12] *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739, 753 (9th Cir. 2001) (citing *Zschernig v. Miller*, 389 U.S. 429 (1968)).

[13] *Id.* at 750.

Foundation to be the *exclusive remedy and forum* and seeking to end all litigation in United States courts of National Socialist era claims shares the same objective as a California regulatory statute that seeks to force publication of information to set up the California state courts as a second forum for contentious litigation of the same claims; nor is there any way rationally to conclude that the California statute does not implicate United States Government diplomatic concerns that mirror those of the Federal Republic. The panel arbitrarily turned a blind eye to the submissions of both the Federal Republic and the United States, which convincingly proved just the opposite. As the amicus brief of the United States quite plainspokenly said, "the premise of the California legislation is in direct conflict with that of United States foreign policy."[14]

The Ninth Circuit's decisions cloud the ability of the Federal Republic to engage in productive negotiations with the United States by impairing the ability of the United States to speak with one voice on matters of foreign affairs and foreign commerce. The diplomatic, economic, and other foreign policy factors that the Federal Republic, the United States, and the other sovereign nations weighed in reaching the international consensus on the establishment of the Foundation and legal peace for German companies extend well beyond any possible interests of the State of California.

The Ninth Circuit's decisions, if left unreviewed, would also invite other states to substitute their own foreign policy objectives for that of the United States, opening the door to intrusive and potentially inconsistent regulation of insurance companies in Germany by 50 separate states. At least six

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[14] Brief for Amicus Curiae the United States of America in Support of Rehearing *En Banc* (filed Aug. 5, 2002) (ER 1255-77).

states in addition to California (Florida,[15] Maryland, Minnesota, New York, Texas, and Washington) have enacted legislation—and at least four other states (Illinois, Massachusetts, New Jersey, and Rhode Island) have introduced legislation—to regulate in potentially inconsistent ways foreign insurance companies that issued policies in Europe over 55 years ago. Several of these states took legislative action soon after the Ninth Circuit's first decision.

6. The Need for Review of the Ninth Circuit's Decisions

The decisions of the Ninth Circuit affront German sovereignty every day they remain unreviewed and uncorrected. The Ninth Circuit's decisions were particularly offensive in failing even to acknowledge the position of the Federal Republic (and the United States) set forth in four amicus curiae briefs filed with the Ninth Circuit. The panel altogether ignored these submissions and articulated no rationale for its *sub silentio* rejection of the views of the two governments that co-chaired the negotiations that led to the Berlin Agreements and entered into the Executive Agreement and, with others, the Joint Statement. The panel's decisions thus fall well short of established norms of reasoned decisionmaking.

Unless corrected, the Ninth Circuit's assault on the internationally negotiated resolution of Holocaust-related issues will detrimentally interfere with German-U.S. relations and with the achievement of important German (and U.S. federal) foreign and domestic policy objectives. The Ninth Circuit's decisions sustaining the State of California's pursuit of its own "foreign policy" threaten a fundamental premise of the bilateral Agreement and German-U.S. foreign relations—that the Foundation should be the exclusive remedy and forum for addressing all claims asserted against German

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[15] The Eleventh Circuit struck down substantially identical legislation enacted in Florida. *See Gerling Global Reinsurance Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001).

companies arising from the National Socialist era and World War II, including claims regarding any remaining unpaid insurance policies. The Ninth Circuit's decisions also undermine the ability of the United States to help achieve "all-embracing and enduring legal peace" for German companies both in courts and before state and local regulatory bodies. The Ninth Circuit's errors in allowing California to interfere with the conduct of U.S. foreign policy, the operation of foreign commerce, and the regulation of insurance companies in Germany are important to both the United States and its allies, and should be corrected.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari to review the Ninth Circuit's decisions.

Respectfully submitted,

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